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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

GERTRUDE GREEN, as Administratrix of the Estate of Sol Green and Individually,

Petitioner,

v.

MERRILL LYNCH, PIERCE, FENNER & SMITH, a Delaware Corporation, and CANTWELL & CANTWELL,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT, FIRST DISTRICT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether an Illinois resident consumer may collaterally challenge the enforcement in Illinois of a default California judgment which patently violated *BMW v. Gore*, by its awarding $50,000 punitive damages on $4,000 alleged actual damages on a consumer credit card debt, obtained by default by a nationwide financial services company in a California state court and registered by default in Illinois, where the Illinois resident consumer, who was elderly and poor, lacked the resources to defend in the distant forum the alleged debt asserted on forged documents against her deceased husband.

RULE 14(b) LIST OF ALL PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

Plaintiff: Gertrude Green, as Administratrix of the Estate of Sol Green and Individually

Defendants: Merrill Lynch, Pierce Fenner & Smith, Inc. and Cantwell & Cantwell

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OPINIONS BELOW

On January 26, 1998, the Cook County Circuit Court of Illinois granted Defendants-Respondent's, Merrill Lynch, Pierce Fenner & Smith ("Merrill Lynch") and Cantwell & Cantwell ("Cantwell") (collectively, "Defendants" or "Respondents"), Motion to Dismiss. (App. B). Mrs. Green filed a motion for reconsideration, which the Circuit Court denied on September 8, 1998.

On October 6, 1998, Mrs. Green filed a Notice of Appeal with the Illinois Appellate Court, First District. On April 20, 2000, the Appellate Court issued its Order and Memorandum Opinion (App. A) which affirmed the final judgment of the Circuit Court. On May 11, 2000, Mrs. Green, acting *pro se*, filed a petition for rehearing with the Appellate Court, which was thereafter denied on June 8, 2000.

Petitioner's timely petition to the Illinois Supreme Court for Leave to Appeal was denied on January 29, 2001. (App. C).

STATEMENT OF JURISDICTION

Jurisdiction for review by this court is based on 28 U.S.C. § 1257(a) to review a final judgment by the highest court of a State in which a decision could be had, where a right (here, due process) is claimed under the Constitution of the United States.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution; Article 4, Section 1:

> Full faith and credit shall be given in each state to the . . . judicial proceedings of every other state.

United States Constitution, Fifth Amendment:

> No person shall . . . be deprived of . . . property, without due process of law. . . .

STATEMENT OF THE CASE

Petitioner's case arises from Merrill Lynch's initiation and prosecution of claims against Sol Green in California, obtaining a default judgment against him for $4,000 (four thousand dollars) for alleged actual damages plus $50,000 (fifty thousand dollars) punitive damages, followed by Merrill's subsequent registration and enforcement of that judgment in Illinois, also by default, and successfully asserting res judicata and full faith & credit to preclude Green's widow from collaterally challenging the judgment being enforced.

I. The California Suit

On December 3, 1987, Robert Green, Sol Green's nephew, president of a corporation doing business in California known as Moving Up International Corp. ("Moving Up"), and an unidentified person, applied to open money market accounts for Moving Up with a Merrill Lynch

office in San Diego. (Complaint ¶12, RC.5).[1] Each account agreement provided for the issuance of VISA cards, and upon the request of Robert Green, without Sol Green's knowledge, VISA cards were issued in the names of Robert Green and Sol Green (Complaint ¶¶12-13, RC.5-6). At that time, the unidentified individual was allowed, also without Sol Green's knowledge, to sign the name of Sol Green on the application form (Complaint ¶13, RC. 5).

As the money market accounts became overdrawn in early 1988, Robert Green, Alison J. Boyd, another officer of Moving Up, and others, not including Sol Green, had several conversations with Merrill Lynch regarding those accounts. (Complaint ¶14, RC.6). During those conversations, Merrill Lynch was expressly informed that Sol Green had resigned from Moving Up over a year earlier, in October of 1986, that his signature had been forged on the account agreements, that he had no knowledge that the accounts existed, and, further, that he never used the accounts or the VISA cards. (Complaint ¶14, RC.6). Nevertheless, Merrill Lynch commenced an action in California against Moving Up, Robert Green, Alison Boyd, Sol Green and two other individuals, alleging that the Merrill Lynch accounts were overdrawn by $20,450 and that the VISA cards had an outstanding balance of $4,233.89 (the "California Suit") (Complaint ¶¶17-18, RC.7 and 23). The California Suit allegations of Sol Green's involvement in Moving Up and the overdrawn accounts were made on information and belief and not supported by any evidentiary material. In fact, throughout this period of time Sol Green was battling severe

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1. Petitioner's Verified Complaint is cited herein as "Complaint ¶ __". The record on appeal to the Illinois Appellate Court is cited herein as "RC. __".

illness and was spending a great deal of time in hospitals and visiting doctors. (RC. 701-710).

Nonetheless, Merrill Lynch still attempted to effect service on Sol Green by directing a process server to an apartment in San Diego, although, Merrill Lynch knew that Sol Green never resided at that address. (Complaint ¶19, RC.8-9). In fact, at the time Merrill Lynch filed the California Suit it had in its possession the Articles of Incorporation and By-Laws of Moving Up indicating that Sol Green's address was 1322 Seward Street, Evanston, Illinois (Complaint ¶20, RC.8). Having failed to effect personal service upon Sol Green, Merrill Lynch attempted service at Sol Green's "usual place of business" by directing a process server to the office of Moving Up despite possessing the specific knowledge that Sol Green had resigned from Moving Up over a year earlier and that the office was closed almost one month before Merrill Lynch claimed to have effected service (Complaint ¶21, RC.8).

On November 14, 1988, Merrill Lynch nonetheless sought and obtained a California court default judgment entitling Merrill Lynch to collect *$84,955.19* from Moving Up, Robert Green, Sol Green, Alison Boyd and others, on the alleged $20,450 overdrawn money market account and the $4,233.89 credit card debt (the "California Default Judgment"). (App. E). The California default judgment included an award of $50,000 in punitive damages and approximately $10,000 in attorneys' fees and costs (Complaint ¶22, RC. 8 and 47). (App. E at 23a and 25a). Despite Sol Green's sole specific act of involvement, as alleged in Defendant's California Suit, being merely providing his signature on the account agreements, which Alison Boyd and Mrs. Green contend in sworn affidavits

were forged, the full amount of the default judgment was eventually only enforced against Sol Green (RC.162).

Moreover, the allegations contained in the California Suit on their face showed Sol Green to be liable only for the $4,233.89 credit card debt. (RC.526-546). The money market accounts overdrawn by $20,450 were strictly a corporate obligation and the California Suit did not contain allegations to show why the corporate veil should be pierced in order to hold Sol Green personally liable. In fact, the trial court below acknowledged that the only claim Sol Green may have been liable for was the $4,000 credit card claim. (RC.43-44, 58).

II. Registration in Illinois of the California Default Judgment

After obtaining the default judgment in the California Suit, Merrill Lynch then contacted Respondent Cantwell to register the judgment in Illinois. On August 3, 1989, Cantwell, on behalf of Merrill Lynch, filed a Citation to Discover Assets on Sol Green. (Complaint ¶26, RC.10). The Citation to Discover Assets notice commanded Sol Green to appear before Judge Irwin Cohen on September 1, 1989 to discover assets not exempt from the enforcement of a judgment purportedly entered on August 2, 1989. Importantly for this petition, no judgment had been registered or entered in Illinois against Sol Green either on or prior to August 2, 1989. In fact, the Petition to Register the default judgment in the California Suit was not filed in Illinois until August 3, 1989, the same day the Citation to Discover Assets was filed. Moreover, under Illinois law, it was improper for Respondents to pursue a Citation to Discover Assets, a supplemental proceeding, before entry of an enforceable judgment.

At this time, Sol Green was seriously ill and mentally infirm (he died five months later, on January 12, 1990). Consequently, Sol Green's family was in some measure of disarray. On August 8, 1989, both the Petition to Register Foreign Judgment and the Citation to Discover Assets were served by substitute service of process. (Complaint ¶24, RC.9).

Because Sol Green was bedridden and seriously ill, Claire Fischer, Sol Green's sister-in-law, appeared on September 1, 1989, and checked in with the clerk (RC.680-1). It has since been determined that the September 1, 1989, hearing related only to the improperly scheduled Citation to Discover Assets, not the Petition to Register the Foreign Judgment. At that hearing, a new hearing date of October 3, 1989, was set (RC.681). At no time was Claire informed that a Rule to Show Cause relating to the Citation to Discover Assets was to issue (RC.681). Indeed, Claire was never provided with a copy of the Order entered at that hearing. Mrs. Green later discovered that the Merrill Lynch attorney wrote the following on that Order: "Defendant having been served by substitute service on August 8, 1989, and not appearing [. . .]" (RC.681). The Order also indicated that a Rule to Show Cause should issue against Sol although Claire was not advised that a Rule to Show Cause would be issued.

Claire left the September 1, 1989 hearing having been led to believe that no action would be taken regarding the registration of the California Default Judgment until October 3, 1989. In the interim, on September 11, 1989, Merrill Lynch filed a "Special Motion for Entry of Default Judgment" with a hearing scheduled for September 18, 1989. While Cantwell signed a Notice of Motion indicating that this motion had

been served on Sol Green by mail at his Evanston home, no member of the Green family ever saw that motion in advance of the hearing. (RC. 681).

On September 18, 1989, no member of the Green family appeared at the Special Motion for Entry of Default Judgment because they had not received notice. Moreover, no order was entered on that date and no order was served on Sol nor appears in the court file. Furthermore, the Green family was led to believe that the October 3, 1989 hearing was scheduled to address the issues of the judgment and the citation to discover assets. A default judgment (the "Illinois Default Judgment") was entered on September 21, 1989, by Judge Thomas P. Quinn against Sol Green in the amount of $84,955.19, with post-judgment interest in the amount of $7,420.08 for a total judgment amount of $95,195.27, plus costs of suit (RC.49). (App. D at 21a).

Neither Sol, Claire Fischer or any other member of the Green family was ever served with a copy of the Illinois Default Judgment (RC. 681). Claire, not knowing what had transpired on September 21, 1989, appeared at the October 3, 1989, hearing on the Citation to Discover Assets which had previously been scheduled. (RC. 681). At the October 3, 1989 hearing, the lawyer from Cantwell advised the court that the Rule to Show Cause had not been served upon Sol Green and he asked for a continuance (RC. 681). The Court ordered that an alias rule to show cause should issue and continued the matter until November 7, 1989. By November 7, 1989, the thirty-day clock for vacating the Illinois Default Judgment would have run.

Claire Fischer also appeared at the November 7, 1989 hearing on behalf of Sol Green. At that time, the court, at

the request of Cantwell, continued the matter until December 8, 1989. When the Cantwell attorney drafted the Order relating to this hearing, he indicated that Sol Green's attorney had requested the continuance; however, Sol Green had never retained an attorney during this period. (RC. 682).

On November 7, 1989, Merrill Lynch issued a Citation to Discover Assets directed at Mrs. Green. (RC. 682). The citation examination of Mrs. Green was held on March 8, 1990. During that proceeding, Mrs. Green was shown a document on which the purported signature of Sol Green appeared and was asked if that was his signature. Mrs. Green stated that the signature was definitely *not Sol's signature*; and, despite her requests, Merrill Lynch refused to produce any receipts indicating that Sol Green ever used the subject credit card. (RC. 10). Mrs. Green also informed counsel for Merrill Lynch that Sol Green had never lived in California, had never worked in California, and was never indebted to Merrill Lynch. In response, an attorney from Cantwell told Mrs. Green not to worry because Sol Green was dead (RC. 10).

At the conclusion of that proceeding, the court entered an order dismissing the proceeding on the condition that Mrs. Green produce a copy of the 1987 and 1988 federal and state tax returns, which she and Sol had filed, as well as other financial documentation. These tax returns were subsequently tendered to Defendants and the action was dismissed.

III. Enforcement of the Illinois Default Judgment

On January 9, 1992, more than two years after entry of default in Illinois, Cantwell, on behalf of Merrill Lynch, filed a Motion to Set Aside a purported fraudulent conveyance of the Green residence from Sol Green to Mrs. Green and grant turnover of the Green residence. (Complaint ¶33, RC. 11) During these proceedings, Judge Irwin Cohen did not permit Mrs. Green, though she tried, to challenge the validity of the California Default Judgment or its registration in Illinois:

> I judicially noticed the fact the entry was in California, the fact it was registered there, the fact it was filed here, or challenged here, those are not issues. They are all gone. The only thing of any matter now that is new and the only thing I am going to consider in reference to this is two items, and whether it is a red herring or not, I am not concerned about it.

(RC. 712). On April 13, 1993, Judge Cohen entered an order granting Merrill Lynch's motion (Complaint ¶¶33 and 36, RC. 12 and 75).

In the interim, on January 8, 1993, Robert Fischer, as administrator of the Estate of Sol Green, filed a complaint in California to set aside the underlying default judgment (RC. 214-220). That action was dismissed by Judge Haden on purely procedural grounds (for failure to attend a case management conference) on August 13, 1993 (RC. 223). The Green family was unable to continue with that California action due to their inability to afford to retain counsel and litigate that action thousands of miles away.

On October 5, 1993, the beneficial interest held by Mrs. Green in the Green residence was sold in accordance with a court ordered judicial sale to Merrill Lynch for $90,000 (Complaint ¶37; RC. 12 and 56). On November 5, 1993, an order was entered confirming the sale of the Green residence. (RC. 853).

In April 1997, Mrs. Green filed her three-count Complaint. On April 20, 2000, the Appellate Court affirmed the trial court's dismissal of the Complaint on grounds of *res judicata*, collateral estoppel and statute of limitations. On January 29, 2001, the Illinois Supreme Court denied petitioner's timely petition for leave to appeal.[2]

REASONS FOR GRANTING THE WRIT

This case presents an important question as to whether the three-prong due process standard for challenging the constitutionality of punitive damage awards, as expressed in *BMW v. Gore*, 517 U.S. 559 (1996), may be asserted to collaterally challenge the enforcement of a facially invalid $50,000 punitive award on $4,000 of alleged actual damages, where such judgment was obtained by default on forged documents in California state court against an elderly and poor resident of Illinois by the judgment creditor, a global financial services firm, which then enforced that default judgment against the Illinois resident by taking her home and asserting that res judicata and full faith and credit precludes the person's collateral challenge to the underlying judgment, ignoring that she lacked the financial resources to defend in California.

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2. Given the lower courts' failure to address the invalidity and unconstitutionality of the California default judgment, the lower courts' grounds for dismissal are not valid or a bar to the relief Petitioner seeks here.

This case thus starkly presents the factual record missing from *Green Tree Financial Corp. v. Randolph*, 531 U.S. 79 (December 11, 2000), in which this court recently declined to permit a consumer's collateral challenge to an agreement to arbitrate, because the record there failed to meet the burden of showing that arbitration there was prohibitively expensive, effectively constituting a denial of due process. 121 U.S. at 522-523.

Here, in contrast, the distant California state court proceedings in which Merrill Lynch sought and obtained a default judgment against the Illinois resident not only for the alleged $4,000 actual damages on the credit card, but, additionally by default, $50,000 in punitive damages, in violation of *Gore* as well as California law, because the Illinois resident defendant lacked the resources to defend the distant case, is precisely the denial of due process which should support an exception to Art. 4, § 1's full faith and credit obligation on the state courts.

The law in this area is basic hornbook. Before the full faith and credit clause can become operative, one must have had his day in court, since it is the essence of "due process of law" that one must be given an opportunity to be heard. *Pink v. A.A.A. Highway Express*, 191 Ga. 502, 13 S.E.2d 337, (1941), *affirmed*, 314 U.S. 201 (1941), *reh. den.*, 314 U.S. 716 (1942). In *BMW v. Gore*, 517 U.S. 559 (1996) this court held that due process precludes punitive damages which do not meet a 3-prong test, evaluating the punitive damage award based on: 1-the degree of defendant's reprehensibility, 2-the ratio of the punitive award to actual/compensatory damages (generally permitting no more than 3 or 4-times actual damages), and 3-a comparison to civil and criminal penalties otherwise imposed on such conduct. Here, the punitive damages on their face violated *Gore* (petitioner, the

defaulting alleged signer for a credit card had no culpability for any of the charges and could not afford to appear in California, the award was 12.5 times the $4,000 alleged actual damages, and there are no "penalties" imposable on a consumer debtor under the law of the forum, California, beyond his obligation to make good for the principal), and were exacerbated by the fact that they were entered by default.

Thus, this case is the factual situation appropriate for this Court to weigh in with the holding that a punitive damage award obtained in a far-away jurisdiction which on its face violates *Gore,* can be challenged collaterally over assertions of res judicata and full faith and credit.

In affording the California Default Judgment full faith and credit the Illinois Appellate Courts blindly accepted the two default rulings rendered in the prior proceedings and ignored their duty to void judgments which are invalid or unconstitutional on their face.

I. The Invalidity of the California Default Judgment

The use of distantly obtained judgments with inadequate process and registration, and facially invalid punitive damage awards are not entitled to full faith and credit or *res judicata* effect against Illinois consumers. Mrs. Green, an 82 year old widow, is faced with losing her house of almost 50 years as well as her right to have her case heard on the merits. Given these dire consequences, it is imperative that this Court do what the lower courts have thus far failed to do — allow an evidentiary determination of the validity of the California Default Judgment and its registration, also by default, in Illinois.

The Illinois Courts gave the California Default Judgment full, faith and credit as if there was no other option available to them. However, it is well known in Illinois that "void judgments are always subject to collateral attack for lack of jurisdiction or fraud." *Miller v. Balfour*, 303 Ill.App.3d 209, 215, 707 N.E.2d 759, 764 (2d Dist. 1999) (*citing*, *In re Marriage of Verdung*, 162 Ill.App.3d 374, 389-90, 515 N.E.2d 454 (1987)). Furthermore, void judgments "may be attacked at any time or in any court, either directly or collaterally". *Evans v. Corporate Services*, 207 Ill.App.3d 297, 302, 565 N.E.2d 724 (2d Dist. 1990). This Court also allows collateral attacks on invalid state court judgments or those that violate due process rights. *See Gore*, 517 U.S. 559 (1996); and *Kalb v. Feurstein, et ux.*, 308 U.S. 433 (1940) (allowing collateral attack on state court foreclosure proceeding; reversing dismissal of action seeking restoration of possession of farm lost in a state court foreclosure proceeding because the state action did not comport with federal law).

The record here shows that at the time the California Default Judgment was entered Merrill Lynch had knowledge that Sol Green was not a resident of California (Complaint ¶20, RC.8), had resigned from Moving Up approximately one year prior to the subject accounts being open (Complaint ¶21, RC.8) and that the purported signature of Sol Green written on the account agreements was placed there without Sol Green's knowledge or authorization. (Complaint ¶14, RC.6).

Additionally, Defendants' registration of the California Default Judgment was also improper and could even be characterized as fraudulent. Under Illinois law, pursuit of a Citation to Discover Assets, a supplemental proceeding, before a judgment has been entered is now, and was then in

1989, not allowed. 735 ILCS § 5/2-1402 (formerly, IL ST CH 110 P 2-1402) ("procedure for conducting supplementary proceedings shall be prescribed by rules"). Supreme Court Rule 277 states: "a supplementary proceeding . . . may be commenced . . . [when] a judgment is . . . subject to enforcement"; *see also Pyshos v. Heart-Land Development Company*, 258 Ill.App.3d 618, 622, 630 N.E.2d 1054, 1057 (1st Dist. 1994) ("[s]upplementary proceedings may only be initiated after a judgment has been entered"); and *State Bank of Piper City v. A-Way, Inc.*, 135 Ill.App.3d 1010, 1015, 482 N.E.2d 620, 624 (3d Dist. 1985) (section 2-1402 proceedings are unavailable to creditors, secured or otherwise, until after judgment capable of enforcement has first been entered in their favor"). Here, Defendants initiated the Citation to Discover Assets proceeding almost two months **prior** to the entry of the California Default Judgment. Not only did Defendants violate Illinois Supreme Court Rule 277 in 1989, but they intentionally misled the lower court into believing that such a process was appropriate. (RC. 64-65). Defendant's violation of, among other things, the rule against filing supplemental proceedings before entry of the Illinois judgment, and their subsequent misstatement to the lower court covering up their violation, had a devastating impact on Petitioner, resulting in the sale of her home, which is deserving of a remedy.

The lower courts' refusal to review the underlying facts in this case should not deter this Court from doing so now. The record here shows that service on Sol Green in California was not proper (Complaint ¶¶19-21, RC.8-9) and, thus, the California court did not have jurisdiction over him. Moreover, Defendants' improper registration of the California Default Judgment in Illinois, also by default, and the Illinois courts' reliance on that judgment being valid,

calls into question its validity in that forum also. And, unlike the facts presented in *Green Tree*, the record here supports rendering the California Default Judgment invalid because the costs associated with being forced to litigate in a far-away forum precluded Petitioner from vindicating her legal rights.

II. The Unconstitutionality of the California Default Judgment

The Illinois courts also completely ignored the fact that the California Default Judgment contained an award of $50,000 in punitive damages, $20,000 of a purely corporate debt and some $10,000 in attorney fees and costs, on essentially a $4,000 credit card claim. In blindly affording the California Default Judgment full, faith and credit, the lower courts failed to make any due process analysis required by *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), nor did they inquire at all into the basis for such an excessive punitive damage award relative to the underlying obligation. Ignoring the "degree of reprehensibility" prong, the Illinois court never permitted any assertion that Sol Green's conduct, even as alleged in the California suit, could support a punitive damage award. Even if the validity of Mr. Green's alleged signature was not challenged, it is difficult to envision how a mere obligation to pay on a credit card default could ever constitute "reprehensible" conduct permitting a punitive damage award. Nor are there any penalties for such conduct-failing Gore's third prong. Most troubling is the obvious disproportionality of the punitive damages at 12.5-times-alleged actual damages. The excessive award of punitive damages assessed against Petitioner, which has resulted in the judicial sale of her home of almost 50 years to Merrill Lynch, grossly violates her right to due process.

As stated in *Gore*, punitive damages may be imposed to "punish unlawful conduct and deter its repetition". *Id.* at 568. But here, the complaint filed against Sol Green in California did not allege any allegation of improper conduct. All assertions against Sol Green, except for his purported signature on the account agreement, were alleged on information and belief.

As recognized by Judge Hogan below, Merrill Lynch's claim against Sol Green was only for $4,000 arising essentially from a breach of a credit card agreement. To award $50,000 in punitive damages against a breach of contract claim and to tack on the $20,450 corporate claim, without even considering the additional approximately $10,000 in attorney fees and other costs, is not only a violation of Petitioner's due process rights under the holding in *Gore*, but is also a violation of California law, the jurisdiction that rendered the default judgment. *Cates Construction, Inc. v. Talbot Partners*, 980 P.2d 407, 427 ("absent an independent tort, punitive damages are not recoverable for breach of contract"). Therefore the Petitioner should have been afforded the opportunity to challenge the validity of the default judgment being enforced.

In order to provide fundamental due process protection for consumers nationwide against such creditor abuses, the Court should grant the petition and declare the appropriate due process limitations on full faith and credit.

CONCLUSION

For all of the foregoing reasons, Petitioner respectfully requests that this Court issue a writ of certiorari to the Illinois Appellate Court, so that the judgment of the appellate court may be reviewed and reversed with instructions to vacate the judicial sale of petitioner's home to respondent Merrill Lynch Pierce Fenner and Smith.

Respectfully submitted,

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APPENDIX A — ORDER OF THE ILLINOIS APPELLATE COURT DATED APRIL 20, 2000

ILLINOIS APPELLATE COURT

No. 98-3886

GERTRUDE GREEN, As Administratrix of the Estate of SOL GREEN and INDIVIDUALLY,

Plaintiff-Appellant and Cross-Appellee,

v.

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC. and CANTWELL & CANTWELL,

Defendants-Appellees and Cross-Appellants.

Appeal from the Circuit Court of Cook County.

No. 97 L. 4850

The Honorable Michael J. Hogan, Judge Presiding.

ORDER

Plaintiff, Gertrude Green, appeals from an order of the circuit court of Cook County granting defendants', Merrill Lynch, Pierce, Fenner & Smith, and Cantwell & Cantwell, combined Sections 2-615 and 2-619 motion to dismiss. 735 ILCS 5/2-615; 735 ILCS 5/2-619 (1998). On appeal, plaintiff

contends that the trial court erred in dismissing her complaint (1) by applying a two-year statute of limitations to her abuse of process claim, (2) by applying the doctrines of *res judicata* and collateral estoppel to conclude that her claims were barred, and (3) by determining that, as a matter of law, a principal cannot conspire with his agent or aid and abet his agent in the commission of a tort. Defendants cross-appeal the trial court's denial of their petition for sanctions pursuant to Rule 137 of the Illinois Supreme Court. We affirm.

On February 19, 1986, Merrill Lynch brought suit in the Superior Court for the County of San Diego, State of California, against, among others, Sol Green. On November 14, 1988, judgment was entered in that Superior Court against defendants, including Sol Green, in favor of Merrill Lynch in the amount of $84,955.19.

On August 25, 1988, Sol Green was the owner of certain real property located at 1322 Seward Street, Evanston, Illinois. On that date Sol Green, as grantor, conveyed the property via quit claim deed, to Gertrude Green for no consideration.

On August 3, 1989, Merrill Lynch filed a Petition for Registration of Foreign Judgment in the circuit court of Cook County, Law Division. This Petition to register was served on Sol Green on August 8, 1989. On September 21, 1989, pursuant to a Special Motion for Entry of Default Judgment filed by Merrill Lynch against Sol Green, judgment was entered by the circuit court in favor of Merrill Lynch and against Sol Green in the amount of $84,955.19, together with post-judgment interest thereon in the amount of $7,240.08 for a total judgment amount of $95,195.27, plus costs of suit.

Appendix A

Prior to and at the time of the conveyance by Sol Green to Gertrude Green of the subject premises, Sol Green owned no significant assets, other than the house, from which to pay existing and contemplated indebtedness, including the claim by Merrill Lynch for the amounts due. Subsequent to and as a result of the transfer by Sol Green to Gertrude Green of the premises, Sol Green became insolvent and unable to pay his claim to Merrill Lynch.

On January 9, 1992, Merrill Lynch filed a motion to set aside the above conveyance as fraudulent, and later filed a motion for summary judgment on this cause. The matter was fully briefed and argued, and the trial court (the circuit court of Cook County) took the matter under advisement.

In the meantime, the Estate of Sol Green (who died in January 1990), had initiated proceedings in California to vacate the California judgment. The California court issued a Temporary Restraining Order ("TRO"), staying the proceedings in Illinois. On January 22, 1993, the Motion of the Estate of Sol Green for a Preliminary Injunction was denied by the California court and the TRO was dissolved. The California court found that the estate had failed to carry its evidentiary burden to support injunctive relief and failed to pursue diligently its attempt to vacate the default judgment entered against Sol Green. On August 13, 1993, the California Superior Court dismissed with prejudice the estate's attempt to vacate the default judgment.

After the matter was resolved in the California court, on April 13, 1993, the circuit court of Cook County granted Merrill Lynch's Motion for summary judgment on its Petition to Set Aside Fraudulent Conveyance. On appeal, this court

affirmed the trial court's grant of summary judgment in an order pursuant to Supreme Court Rule 23. On June 8, 1993, the court entered an order granting Merrill Lynch's "Motion to Enter Judgment and Grant Turnover". The Evanston property was sold at a public sale to Merrill Lynch, the highest bidder, for $90,000. Merrill Lynch's Motion to Confirm Sale was granted on November 5, 1993. Gertrude Green appealed this ruling to this court. In an order pursuant to Supreme Court Rule 23, this court affirmed, finding that the record in this case conclusively established that Merrill Lynch had proven fraud-in-law.

On April 24, 1994, Gertrude Green filed a Complaint in the U.S. District Court for the Northern District of Illinois seeking to vacate the California judgment entered against Sol Green on November 14, 1988. Although the order of the Federal District Court was later vacated based on lack of federal subject matter jurisdiction, that court found that Green's fourth attempt to attack the judgment of the California court was precluded by the doctrines of *res judicata* and/or collateral estoppel.[1]

---

1. The federal court pointed out that "Green and his estate have had ample opportunity to challenge Merrill Lynch's claim and its subsequent attempts to enforce its judgment have cycled through various counsel and three court systems in the process. The issue of whether or not the California courts obtained personal jurisdiction over Sol Green was decided in the initial default judgment, effectively upheld by the dismissal with prejudice of the estate's attempt to vacate that default, and further confirmed by the Illinois state court's recognition of that judgment and refusal to allow a collateral attack. ***Whether barred by res judicata or collateral estoppel, one thing is certain: Gertrude Green will no longer beat this dead horse in this Court.***" (emphasis added).

Appendix A

On April 27, 1997, plaintiff filed the complaint in the instant action. Defendants moved to dismiss pursuant to Sections 2-615 and 2-619 of the Illinois Code of Civil Procedure. The trial court granted the motion and dismissed the complaint. Defendants then filed a Petition for Sanctions pursuant to Rule 137 of the Illinois Supreme Court. Plaintiff responded along with a Motion for Reconsideration. The trial court denied both motions on September 8, 1998. This appeal followed.

Our review is *de novo. Board of Directors of Bloomfield Club Recreation Ass'n v. Hoffman Group, Inc.*, 186 Ill. 2d 419 (1999); *Petty v. Crowell*, 306 Ill. App. 3d 774 (1999).

I. The Appropriate Statute of Limitations

The requisite elements of an action for abuse of process in Illinois are: (1) the existence of an ulterior purpose or motive; and (2) some act in the use of the legal process which is not proper in the regular prosecution of the proceedings. *Holiday Magic v. Scott*, 4 Ill. App. 3d 962, 966, *appeal denied*, 52 Ill. 2d 594 (1974). The action lies for improper use of process after it has been issued for the purpose of accomplishing a result which could not be accomplished through the suit itself. See *Bonney v. King*, 201 Ill. 47, 50-51 (1903) Courts in Illinois have found that this cause of action generally requires plaintiff to have suffered an actual arrest or seizure of his property. *John Allan Co. v. Brandow*, 59 Ill. App. 2d 328, 335, appeal denied, 32 Ill. 2d 625 (1965).

In the instant case, the last act which may have given rise to the abuse of process action herein was the October

Appendix A

1993 Judicial Sale of the Evanston property and subsequent confirmation of Sheriff's Report of Sale on or about November 5, 1993.

Relying on this court's holding in *Withall v. Capitol Federal Savings of America*, 155 Ill. App. 3d 537 (1987), the trial court ruled that plaintiff's cause of action for abuse of process is governed by the two-year statute of limitations set forth in Section 13-202 (735 ILCS 5/13-202 (West 1986)). Accordingly, the last day on which plaintiff could have filed the complaint herein was November 5, 1995. Since she failed to file on or before that date, the court found that her Complaint was time barred. Plaintiff contends that the trial court's reliance on *Withall* was misplaced in that its holding was rejected by this court in *Safeway Insurance Co. v. Spinak*, 267 Ill. App. 3d 513 (1994).

In *Safeway*, this court addressed the appropriate statute of limitations for the tort of filing an unauthorized lawsuit. The appellees in that case pointed to *Withall* in support of their contention that the two-year statute of limitations found in 13-202 should be applied to that cause of action. This court disagreed, and applied the five-year statute of limitations found in 13-205 (735 ILCS 5/13-205 (West 1993)).

We note first that before reaching the above conclusion, the court in *Safeway* stated "[w]e are not instantly asked to determine the limitation period applicable to an action for abuse of process and, consequently, we will not comment upon the holding in *Withall* other than to note that it is unsupported by citation to authority." *Safeway*, 267 Ill. App.

3d at 517. As the preceding language makes clear, this court in *Safeway* did not overrule *Withall* (and in fact specifically declined to do so), the holding therefore retains its vitality as good law and binding precedent on trial courts of this state. See *State Farm v. Yapejian*, 152 Ill. 2d 533, 5390 (1992). Nevertheless, plaintiff urges that dicta in *Safeway* compels a different conclusion. Specifically, this court stated "[m]alicious prosecution and abuse of process are separate and distinct torts which differ elementally, and an action for the 'unauthorized filing' of a lawsuit is separate and distinct from both." *Safeway*, 267 Ill. App. 3d at 519. While we do not now disagree that malicious prosecution and abuse of process are different torts, we find that elementally, they are similar causes of action, although abuse of process requires less proof. Specifically, abuse of process claims allow plaintiffs to recover without showing want of probable cause of termination of the original suit in his favor.[2] See Dan B. Dobbs, Torts § 438 at 1235 (2000). In this way, plaintiffs who might otherwise be left without a remedy are allowed an alternative possibility. We determine that abuse of process is an extension or outgrowth of the tort of malicious prosecution, there being different elements but a similar policy and purpose (the prevention of abusive initiation and continuation of lawsuits) to each cause of action. Accordingly, it would be inconsistent to apply a two-year statute of limitations to one, and a five-year statute of limitations to the other. Furthermore, we see no reason to

---

2. We have reviewed the cases cited by plaintiff in purported support of her contention, and find that they buttress our conclusion that the torts of malicious prosecution and abuse of process "share much in common and often overlap." *Hyde Construction Co. v. Koehring Co.*, 387 F. Supp. 702 (S.D.Miss. 1974).

depart from the holding in *Whithall* and thus we hold that the trial court correctly applied the two-year statute of limitations found in 13-202 to bar plaintiff's cause of action.

II. Res Judicata and Collateral Estoppel

Under the doctrine of *res judicata*, a final judgment on the merits rendered by a court of competent jurisdiction acts as a bar to a subsequent suit between the parties involving the same cause of action. *Rein v. David A. Noyes & Co.*, 172 Ill. 2d 325, 334-35 (1996). The bar extends to what was actually decided in the first action, as well as those matters that could have been decided in that suit. *La Salle National Bank v. County Board of School Trustees*, 61 Ill. 2d 524, 529 (1975).

For the doctrine of *res judicata* to apply, the following three requirements must be satisfied: (1) there was a final judgment on the merits rendered by a court of competent jurisdiction, (2) there is an identity of causes of action, and (3) there is an identity of parties or their privies. *DeLuna v. Triester*, 185 Ill. 2d 565, 572 (1998).

In this case, the trial court found that plaintiff's complaint was barred by the application of the doctrine of *res judicata* since the issues being litigated in the instant action (essentially, the validity of the Judgment(s) against Sol Green in favor of Merrill Lynch) were already litigated in California during the motion for preliminary injunction, or alternatively, could have been litigated within the context of the proceeding conducted pursuant to the motion to register foreign judgment before the circuit court of Cook

County. Plaintiff argues that this ruling was erroneous in that she could not have litigated her abuse of process claim within those proceedings, since that claim did not arise until there was an actual seizure of her property in the form of the June 8, 1993 Judicial Sale.[3] See *Bonney v. King*, 201 Ill. 2d at 50-51. Therefore, she argues, *res judicata* should not be a bar to the instant action.

A. Identity of causes of action.

In their brief, defendants refer us to *Rodgers v. St. Mary's Hospital*, 149 Ill. 2d 302 (1992), in which our Supreme Court explained that Illinois courts have adopted two tests for determining whether there is an identity of causes of action for purposes of *res judicata*. Those tests are known as the "same evidence" test and the "transactional" test. *Rogers*, 149 Ill. 2d at 311-12. We note that in *River Park Inc. v. City of Highland Park*, 184 Ill. 2d 290, 311 (1998), the Court expressed a preference for the use of the transactional test. The transactional test provides that "the assertion of different kinds or theories of relief still constitutes a single cause of action if a single group of operative facts give (sic) rise to the assertion of relief." *River Park*, 184 Ill. 2d at 307, quoting *Rodgers*, 149 111. 2d at 312, quoting *Pfeiffer v. William Wrigley Jr. Co.*, 139 Ill. App. 3d 320, 323 (1985), quoting *Baird & Warner, Inc. v. Addison Industrial Park, Inc.*, 70 Ill. App. 3d 59, 64 (1979). In other words, where a plaintiff has already litigated based on a group of operative facts, he

3. We note that plaintiff does not dispute that there is identity of parties/privies, and so we concentrate our analysis on the remaining two prerequisites to the application of the *res judicata* doctrine.

should not be allowed to "substitute labels" and then proceed under a different cause of action. *River Park*, 184 Ill. 2d at 316. See e.g., *Board of Education of Sunset Ridge School District No. 29 v. Village of Northbrook*, 295 Ill. App. 3d 909, 917 (1998) (earlier suit between the parties concerning annexation involved the same cause of action as a subsequent suit involving annexation); *Zabel v. Cohn*, 283 Ill. App. 3d 1043, 1049-50 (1996) (former employee's suit against employer for unjust enrichment, breach of contract, *quantum meruit*, and administrative review of the dismissal of his wage claim involved the same cause of action as his previous suit alleging an entitlement to a distribution of the assets of the law firm where he worked); *Bennett v. Gordon*, 282 Ill. App. 3d 378, 383 (1996) (attorney's fee petition and client's legal malpractice action were the same cause of action); *Horton v. Caterpillar, Inc.*, 260 Ill. App. 3d 150, 153 (1994) (employee's federal action against his employer was the same cause of action as his state claim for retaliatory discharge). In order properly to allege abuse of process, plaintiff would have to show that defendants committed some act in the use of the legal process which is not proper in the regular prosecution of the proceedings. *Holiday Magic*, 4 Ill. App. 3d at 966. In her attempt to make such a showing, plaintiff seeks to establish that: (1) Sol Green's signature on the account agreement was forged; (2) Sol Green had resigned from Moving Up and did not know about the Merrill Lynch accounts: (3) Merrill Lynch knew that Sol Green resigned; (4) Merrill Lynch knew that Sol Green did not live or work in California when they served him with summons and complaint in California; (5) Sol Green was not indebted to Merrill Lynch; (6) Merrill Lynch is not the holder of a valid final judgment from California; (7) Merrill Lynch should

not have been permitted to register its judgment in Illinois; (8) Gertrude Green did not receive the subject property via a fraudulent conveyance; and (9) the subject property was not properly sold via judicial sale. As the trial court correctly determined, each of these issues was litigated in the California proceeding in which plaintiff's TRO was dissolved, and in Illinois when defendants sought to register the California judgment, and during (now) defendant's Petition to Set Aside Fraudulent Conveyance. Moreover, each issue was resolved against plaintiff and in favor of defendants.

There is no question but that the instant action involves exactly the same group of operative facts as did the previous suits. We therefore find, under an application of the transactional test, that there is an identity of causes of action. The doctrine of *res judicata* requires that plaintiff's attempt to substitute the label of abuse of process for the others she has already used to challenge that judgment must fail.

B. Final judgment(s) on the merits by court(s) of competent jurisdiction

Although not made entirely explicit in her Complaint or supporting brief, it appears that plaintiff's challenge to jurisdiction is rooted in her allegation that the California court which rendered the original judgment against Sol Green was without jurisdiction over his person. This issue was considered by that court; that court concluded it had jurisdiction over Sol Green. We afford that conclusion full faith and credit, as we are required to do. See U.S. Const. Art. IV, Sec. 1. See also *Hayes v. Louisiana Dock Co.*, 117

Ill. App. 3d 512 (1983). Furthermore, an independent review of the California court's assertion of personal jurisdiction under those circumstances reveals that it was proper. See *IBM v. Martin Property*, 261 Ill. App. 3d 854 (1996).

Moreover, we recognize that the above judgment was on the merits for purposes of *res judicata* application. See *Pfaff v. Chrysler Corp.*, 208 Ill. App. 3d 910 (1991), quoting *Durfee v. Duke*, 375 U.S. 106, 109 (1963) (the full faith and credit clause of the United States Constitution generally requires every state to give a foreign judgment at least the *res judicata* effect which the judgment would be accorded in the state which rendered it). Under California law, the default judgment against Sol Green precluded further litigation of "all material allegations contained in the complaint in the first action, and every fact necessary to uphold the default judgment." *Mitchell v. Jones*, 342 P.2d 503 (Cal.Ct.App. 1959). Furthermore, and contrary to plaintiff's contention, we find that the order of the California court which dissolved the TRO against Merrill Lynch, and dismissed with prejudice plaintiff's petition to set aside the August 13, 1993 California judgment, was a final judgment on the merits, which serves as a complete bar to further litigation on the same cause of action. See *Long Beach Grand Prix Assoc. v. Hunt*, 25 Cal. App. 4th 1195, 1197 (2nd Dist. 1994), citing *Torrey Pines Bank v. Superior Court*, 216 Cal. App. 3d 813, 820-21 (4th Dist. 1989).

C. Collateral Estoppel

The trial court also relied on the doctrine of collateral estoppel to conclude that plaintiff is barred from bringing

the instant suit. The prerequisites for the application of that doctrine are: (1) an issue, decided in the prior adjudication which is identical with the one presented in the suit in question, the determination of which was essential to that decision; (2) a final judgment on the merits; and (3) the party against whom estoppel is being asserted are the same or are in privity with a party to the prior adjudication. *Illinois State Chamber of Commerce v. Pollution Control Board*, 78 Ill. 2d 1 (1979). In light of the analysis found in sections A and B, above, we conclude that the doctrine of collateral estoppel was properly applied to bar the instant cause of action.

III. Civil Conspiracy and Aiding and Abetting

The trial court found that plaintiff's causes of action for civil conspiracy and aiding and abetting could not stand since Cantwell and Cantwell acted as the agent for Merrill Lynch. Because we determine that our conclusion with respect to the appropriate statute of limitations is dispositive of these claims, we decline to consider the matter of whether a principal and an agent can be liable for civil conspiracy or aiding and abetting. See *Board of Education of Community High School Dist. No. 94 v. Regional Bd. of School Trustees of Du Page County*, 242 Ill. App. 3d 229, 245 (1993).

A. Civil Conspiracy

Although the Illinois Supreme Court has recognized civil conspiracy as a cause of action, such a claim will exist only if one of the parties to the agreement commits some act in furtherance of the agreement, which is itself a tort. *Adcock v. Brakegate, Ltd.*, 164 Ill. 2d 54, 65 (1994). In general, the

statute of limitations in a civil conspiracy action runs from the commission of the last overt act alleged to have caused damage. *Austin v. House of Vision, Inc.*, 101 Ill. App. 2d 251, 255 (1968). However, in deciding the limitations period for a conspiracy action, a court must look to the limitations period for the underlying tortious conduct upon which that conspiracy is based. *Austin*, 101 Ill. App. 2d at 255. In the instant case, plaintiff's conspiracy action is predicated upon the alleged facts which constitute the underlying abuse of process action. Specifically, plaintiff alleges that defendants conspired to enforce a fraudulent judgment and eventually facilitate a judicial sale of the Evanston property. Since it has already been determined that the statute of limitations for plaintiff's abuse of process claim is two years, and expired on November 5, 1995, we conclude that the time in which plaintiff could have filed a claim for civil conspiracy arising out of that same tortious conduct had also expired by the time she filed the Complaint herein.

B. Aiding and Abetting

Plaintiff relies on the same facts in support of her claim of aiding and abetting. Illinois courts have held that in the absence of provable tortious conduct by the primary wrongdoer, there will be no liability for aiding and abetting. See *Reuben H. Donnelly Corp. v. Brauer*, 275 Ill. App. 3d 300, 314 (1995). In this case, Merrill Lynch would be the purported primary wrongdoer for allegedly improperly obtaining a judgment against Sol Green in California and then moving to have the judgment registered in Illinois. In addition to being barred by *res judicata* from relitigating the question of whether defendants' conduct was tortious,

we conclude that plaintiff is precluded from raising this claim because the statute of limitations on the underlying tortious conduct (two years) has expired.

IV. Defendants' Cross-Appeal for Sanctions

Defendants filed a timely cross-appeal, seeking the imposition of sanctions pursuant to Illinois Supreme Court Rule 137. The issue was briefed and presented via oral argument to the trial court, which denied defendant's petition, stating "I don't think this is a case that warrants sanctions so I don't think an evidentiary hearing is necessary."

The determination of whether to impose sanctions rests within the sound discretion of the trial court. That decision is entitled to great weight and will not be disturbed on review absent an abuse of discretion. *Yassin v. Certified Grocers of Illinois, Inc.*, 133 Ill. 2d 458, 467 (1990). We find no abuse of discretion in this case.

Defendants (cross-appellants) refer this court to decisions from our Second and Third Districts, in which it was held that the trial court must make specific factual findings when they deny Rule 137 sanctions, and that the failure to do so is grounds for remand. See e.g., *Heiden v. Ottinger*, 245 Ill. App. 3d 612 (1993); *In re Estate of Smith*, 201 Ill. App. 3d 1005 (1990). We decline to follow those decisions, and choose instead to adhere to this District's opinion in *Shea, Rogal & Assoc. v. Leslie V.W.*, 250 Ill. App. 3d 149 (1993). In *Shea*, we held that, in accordance with the language of Rule 137, a judge is required to specifically set forth the reasons and basis for any sanction imposed,

however, there is no such specificity requirement when sanctions are denied. *Shea*, 250 Ill. App. 3d at 155. Accord *Elledge v. Reichert*, 250 Ill. App. 3d 1055 (4th Dist. 1993). Consequently, the trial court's denial of defendant's motion for Rule 137 sanctions is affirmed.

V. Conclusion

Based on the foregoing, the order of the circuit court of Cook County is affirmed.

Affirmed.

BARTH, J., with HOFFMAN, P.J., and HALL, J., concurring.

APPENDIX B — ORDER OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS DATED JANUARY 26, 1998

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

NO. 97 L 04850

Gertrude Green,

Plaintiff,

v.

Merrill Lynch, et al.,

Defendants

ORDER

This cause coming to be heard upon Defendants' Motion to Dismiss pursuant to both Sections 2-615 and 2-619, continued from previous dates, the parties appearing by counsel, and the Court having reviewed the pleadings and briefs and having heard argument, and the Court being otherwise fully advised in the premises,

The Court does find that this Complaint is barred by res judicata and collateral estoppel, these issues having been litigated in California on the Motion for Preliminary Injunction and these issues having the opportunity to be raised before Judge Quinn on the Petition to Register Foreign Judgment; the Court does further find that the cause of action

for abuse of process is barred by the applicable two-year statute of limitations, and the causes of action for conspiracy and aiding and abetting cannot stand because Cantwell & Cantwell acted as the agent for Merrill Lynch;

It is therefore ordered that Defendants' Motion to Dismiss is granted and Plaintiffs' Complaint is dismissed with prejudice.

ENTER:

s/ Michael J. Hogan
Judge

APPENDIX C — LETTER OF THE ILLINOIS SUPREME COURT DENYING PETITION FOR LEAVE TO APPEAL DATED JANUARY 29, 2001

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILLINOIS 62701
(217) 782-2035

January 29, 2001

Mr. Clinton A. Krislov
Clinton A. Krislov, P.C.
222 N. LaSalle Street
Suite 2120
Chicago, IL 60601

No. 89826 — Gertrude Green, as Adm'rx. etc., petitioner, v. Merrill, Lynch, Pierce, Fenner & Smith, etc., et al., respondents. Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on February 20, 2001.

APPENDIX D — ORDER OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS, COUNTY DEPARTMENT, LAW DIVISION REGISTERING BY DEFAULT THE CALIFORNIA DEFAULT JUDGMENT DATED SEPTEMBER 21, 1989

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

No. 89 L 10820

MERRILL LYNCH, PIERCE, FENNER
& SMITH, INC., a corporation,

Plaintiff,

vs.

SOL GREEN,

Defendant.

ORDER

THIS CAUSE coming to be heard upon MERRILL LYNCH's Motion for Entry of Default Judgment against Defendant, SOL GREEN, due notice having been served and the Court being otherwise fully advised in the premises;

THE COURT DOES FIND AS FOLLOWS:

1. On August 3, 1989, MERRILL LYNCH registered a Foreign Judgment obtained in the State of California against Sol Green.

2. A Summons and Petition to Register a Foreign Judgment was served on Defendant on August 8, 1989.

3. Defendant has not filed an Appearance and Answer in this cause.

ACCORDINGLY, IT IS HEREBY ORDERED that the registered Foreign Judgment in favor of MERRILL LYNCH and against Defendant, SOL GREEN, is entered as a final Judgment of the State of Illinois; and Judgment is entered in favor of MERRILL LYNCH and against Defendant, SOL GREEN, in the amount of EIGHTY-FOUR THOUSAND, NINE HUNDRED FIFTY-FIVE AND 19/100 ($84,955.19) DOLLARS together with post-judgment interest thereon computed at the rate of 10% per annum from and after November 14, 1988 pursuant to the provisions of § 685.010 of the California Code of Civil Procedure in the amount of SEVEN THOUSAND, TWO HUNDRED FORTY AND 08/100 ($7,240.08) DOLLARS for a total Judgment amount of $95,195.27 DOLLARS plus costs of suit.

ENTER:

JUDGE THOMAS P. QUINN
SEP 21 1989

s/ Thomas P. Quinn
Circuit Court
Judge

APPENDIX E — DEFAULT JUDGMENT OF THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO DATED AND FILED NOVEMBER 14, 1988 AND ENTERED NOVEMBER 15, 1988; AND REQUEST FOR ENTRY OF DEFAULT

NAME AND ADDRESS OF ATTORNEY:
JAMES F. STIVEN, ESQ.
RICHARD P. MURPHY, ESQ.
GRAY, CARY, AMES & FRYE
401 "B" Street, Suite 1700
San Diego, CA 92101

TELEPHONE NO:
699-2812

* * *

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO

PLAINTIFF: (ABBREVIATED)
MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.

DEFENDANT: (ABBREVIATED)
MOVING UP INTERNATIONAL CORPORATION, et al.

JUDGMENT BY DEFAULT
CASE NUMBER
595977

JUDGMENT BY DEFAULT BY COURT

The defendant(s) MOVING UP INTERNATIONAL CORPORATION, ROBERT GREEN, SOL GREEN and ALISON J. BOYD having been regularly served with

summons and copy of complaint, having failed to appear and answer said complaint within the time allowed by law, and the default of said defendant(s) having been duly entered, upon application of plaintiff to the Court, and after having considered the evidence:

IT IS THEREFORE ORDERED AND ADJUDGED that plaintiff(s) have and recover from said defendant(s) the following sums:

Principal Sum	$ 74,928.64
Attorney Fee	$ 8,000.00
Interest	$ 1,544.55
Costs	$ 482.00
Total	$ 84,955.19

Dated: NOV 14 1988

s/ J. Richard Haden
Judge of the Superior Court
J. Richard Haden

Appendix E

ADDENDUM

REQUEST FOR ENTRY OF DEFAULT

ATTORNEY (Name and Address)	TELEPHONE NO.
JAMES F. STIVEN, ESQ. RICHARD P. MURPHY, ESQ. GRAY, CARY, AMES & FRYE 401 "B" Street, Suite 1700 San Diego, CA 92101 ATTORNEY FOR *(Name)* Plaintiff	699-2812

San Diego Superior Court

PLAINTIFF: MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.

DEFENDANT: MOVING UP INTERNATIONAL CORPORATION, et al.

REQUEST FOR ☒ ENTRY OF DEFAULT
☒ COURT JUDGMENT

* * *

CASE NUMBER 595977

1. TO THE CLERK: On the complaint or cross-complaint filed
   a. on *(date)*: February 19, 1988
   b. by *(name)*: MERRILL LYNCH, PIERCE, FENNER & SMITH

Appendix E

c. ☒ Enter default of defendant *(names)*: ROBERT GREEN, SOL GREEN, ALISON J. BOYD, MOVING UP INTERNATIONAL CORPORATION

d. ☒ I request a court judgment under CCP 585(b), (c), 989, etc. *(Testimony required. Apply to the clerk for a hearing date, unless the court will enter a judgment on an affidavit under CCP 585(d).)*

* * *

2. Judgment to be entered	Amount	Balance
a. Demand of complaint	$ 24,928.64	$ 24,928.64
b. *(superior court only)** ... Notice of punitive damages **SEE BELOW**	$ 50,000.00	$ 50,000.00
c. Interest	$ 1,544.55	$ 1,544.55
d. Costs *(see reverse)*	$ 482.00	$ 482.00
e. Attorney fees	$ 12,044.44	$ 12,044.44
f. TOTALS	$ 88,999.63	$ 88,999.63

* * *

---

* Personal injury or wrongful death actions only.

** PURSUANT TO LOCAL RULE 10.4(b)

Appendix E

Date: August 16, 1988

RICHARD P. MURPHY (TYPE OR PRINT NAME)	s/ Richard P. Murphy (SIGNATURE OF PLAINTIFF OR ATTORNEY FOR PLAINTIFF)

FOR COURT USE ONLY

(1) ☒ Default entered as requested on *(date)*:
AUG 16 1988

* * *

ROBERT D. ZUMKALT, Clerk

By: s/ Charlene Wright
Deputy

Supreme Court, U.S.
FILED
[illegible] 6 [illegible]
CLERK

No. 00-1667

In The

Supreme Court of the United States

GERTRUDE GREEN, as Administratrix of the Estate of Sol Green and Individually,

Petitioner,

v.

MERRILL LYNCH, PIERCE, FENNER & SMITH INC., a Delaware Corporation, and CANTWELL & CANTWELL,

Respondents.

On Petition For A Writ Of Certiorari To The Illinois Appellate Court, First District

BRIEF IN OPPOSITION

PETER A. CANTWELL
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COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6

Petitioner, Gertrude Green, states that she is bringing this action individually and as Administratrix of the Estate of Sol Green. Sol Green died in the County of Cook, State of Illinois. There has never been, however, any evidence that letters of office were ever issued to Gertrude Green in the Estate of Sol Green.

Merrill Lynch & Co. Inc. is a Delaware corporation and the parent corporation of Merrill Lynch, Pierce, Fenner & Smith Inc., also a Delaware corporation.

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STATEMENT OF THE CASE

Petitioner, Gertrude Green (Mrs. Green), takes liberties in stating the facts as presented to the Illinois Appellate Court. Mrs. Green's Statement of the Case presents allegations of the Complaint (RC. 3) and contested allegations from the Affidavit of Claire Fischer (RC. 680) as if they were evidence. She presents disputed facts irrelevant to the issues decided by the Illinois Appellate Court, and omits material undisputed facts which are relevant to the issues decided. Many of the pronouncements in Mrs. Green's Statement of the Case are conclusions of law or fact which are not supported by the record in the Illinois Appellate Court. The pertinent undisputed material facts are set forth in the Order of the Illinois Appellate Court dated April 20, 2000 (App.A to the Petition).

It is important to note that this is not Mrs. Green's first attempt to attack Merrill Lynch's California Judgment. After the Honorable Irwin Cohen granted Merrill Lynch's Motion to Set Aside Fraudulent Conveyance on April 3, 1993, Mrs. Green appealed to the Illinois Appellate Court which affirmed Judge Cohen's decision on February 2, 1996. Then, on April 4, 1996, Mrs. Green filed her Petition for Leave to Appeal to the Supreme Court of Illinois, which was denied on June 5, 1996. In the meantime, on April 24, 1994, Mrs. Green filed a complaint in the United States District Court for the Northern District of Illinois seeking to vacate the California Judgment. When this was dismissed by order of October 18, 1994, Mrs. Green appealed to the Seventh Circuit Court of Appeals, which remanded the case with instructions to dismiss for want of subject matter jurisdiction (RC. 130-131). Thereafter, in April 1997, Mrs. Green filed the Complaint in the action *sub judice*.

The most egregious aspect of Mrs. Green's ill-conceived Petition lies in the fact that the underlying state court lawsuit from which this Petition emanates was an action for abuse of process, conspiracy and aiding and abetting, which was dismissed under the applicable statute of limitations. The lawsuit was not a petition to vacate a judgment, nor did it attempt to collaterally attack the California Judgment. In fact, Gertrude Green's own counsel argued quite adamantly during the course of the proceedings before the Honorable Michael Hogan in the trial court as follows:

> We are not standing before this Court seeking to vacate a judgment entered in California. We are standing in this Court seeking monetary damages on the basis of a cause of action for abuse of process, conspiracy and aiding and abetting. We're not here trying to vacate what was done in California.

(Report of Proceedings, January 26, 1998, p. 24). Thus, the federal question upon which Mrs. Green seeks review was neither raised in the trial court nor was it raised in the Illinois Appellate Court.

I. The California Suit

Mrs. Green's description of Merrill Lynch's lawsuit against Robert Green, Sol Green and others in California is misleading, incorrect and improper. A major portion of her description relies on nothing more than the allegations of her Verified Complaint against Merrill Lynch and Cantwell & Cantwell (RC. 3-18). Many of the allegations made in that Complaint were not within the personal knowledge of Mrs. Green and were not properly sworn to

by her. Many of the allegations made in that Complaint were controverted by Affidavits filed during the course of the proceedings in the Illinois state court (RC. 781 and 783). Moreover, it had been demonstrated during the state court proceedings brought by Merrill Lynch to enforce the California Judgment that Gertrude Green lacked credibility. For example, in sworn testimony, Gertrude Green had stated that she and Sol Green were divorced in March of 1961, yet thereafter Gertrude and Sol Green held themselves out as husband and wife and filed joint tax returns (RC. 847).

Petitioner's account of the so-called facts pertaining to the California litigation also relies on the Affidavit of Alison Boyd, one of the defendants in the California lawsuit (RC. 697-698). This Affidavit was never signed or notarized, and therefore is totally incompetent. Furthermore, the Affidavit consisted in large measure of inadmissible hearsay, and it was demonstrated in the state court that her assertions lacked credibility (RC. 792-793).

In her Statement of the Case, Mrs. Green misrepresents the nature of the California Complaint and the allegations against her husband. It was not a simple breach of contract action. The California Complaint (RC. 526-546) contained seven separate counts, six of which were directed at Sol Green, among others, and included causes of action for conversion and fraud. The allegations of the California Complaint, which were never properly denied by any of the defendants to that suit, supported the entry of the judgment of $24,928.64 against all of the defendants, together with punitive damages of $50,000.00, attorneys' fees of $8,000.00, interest of $1,544.55 and costs of $482.00. (App.E to the Petition).

Mrs. Green's attempt to once again assert these same incompetent and controverted facts is unwarranted. As the Illinois Appellate Court noted in its Order of April 20, 2000 (App.A to the Petition, pp. 10a-11a):

> . . . plaintiff seeks to establish that: (1) Sol Green's signature on the account agreement was forged; (2) Sol Green had resigned from Moving Up and did not know about the Merrill Lynch accounts; (3) Merrill Lynch knew that Sol Green resigned; (4) Merrill Lynch knew that Sol Green did not live or work in California when they served him with summons and complaint in California; (5) Sol Green was not indebted to Merrill Lynch; (6) Merrill Lynch is not the holder of a valid final judgment from California; (7) Merrill Lynch should not have been permitted to register its judgment in Illinois; (8) Gertrude Green did not receive the subject property via a fraudulent conveyance; and (9) the subject property was not properly sold via judicial sale. As the trial court correctly determined, each of these issues was litigated in the California proceeding in which plaintiff's TRO was dissolved, and in Illinois when defendants sought to register the California Judgment, and during (now) defendant's Petition to Set Aside Fraudulent Conveyance. Moreover, each issue was resolved against plaintiff and in favor of defendants.

II. Registration of the California Judgment in Illinois.

Petitioner's rendition of the procedural history of Merrill Lynch's efforts to register the California Judgment in the Illinois state court is equally flawed. Here, Mrs. Green relies heavily on the Affidavit of Claire Fischer

(RC. 680-683), her sister. Claire Fischer's Affidavit was, however, totally controverted by the Affidavits of Peter A. Cantwell (RC. 781-782) and Paul H. Scheuerlein (RC. 783-786), as well as the court orders entered in the proceedings in the Illinois state court.

Claire Fischer attested that she came to court on September 1, 1989, which was the return date for the Citation to Discover Assets issued against and served upon Sol Green. This is contradicted by the record. A Rule to Show Cause was properly issued on September 1, 1989 (RC. 785-810), but the Order does not reflect that Claire Fischer stepped before the bench on that day. The judge in the courtroom that day was the Honorable Randye Kogan, who is female. There was no male judge in the courtroom that day as stated by Claire Fischer in her Affidavit. When Claire Fischer did actually appear in court on behalf of Gertrude Green on January 30, 1990, it was reflected in the Order (RC. 829).

Claire Fischer stated in her Affidavit that neither she nor Sol nor Gertrude were served with a copy of Merrill Lynch's Special Motion for Entry of Default Judgment. This assertion is not supported by the record. Sol Green was provided with Notice of the Default Motion by regular mail as required by court rules (RC. 812). Claire Fischer was not entitled to receive Notice because, at that point in time, neither Merrill Lynch nor its attorneys were aware that Claire Fischer, a non-attorney, was attempting to represent the Greens, even informally. Mrs. Fischer also stated that neither she nor any member of the Green family was served with a copy of the Illinois Default

Judgment. Although service of a default judgment is not a requirement of Illinois law, Sol Green was informed of the Judgment of September 21, 1989, by correspondence dated October 4, 1989 (RC. 816).

Claire Fischer asserted in her Affidavit that she came to court on October 3, 1989, the return date of the Rule to Show Cause issued against Sol Green. If she did come to court on that day, she did not step before the bench and Merrill Lynch's attorney did not know that she was there. No transcript, court record or document has ever been produced to support her bald allegation. Furthermore, Merrill Lynch was not seeking a continuance at that time, but merely informed the court that the Rule to Show Cause had not been served upon Sol Green. Therefore, an Alias Rule to Show Cause was issued returnable November 7, 1989, as set forth in the Order entered that day (RC. 814).

Claire Fischer claimed in her Affidavit that she came to court on November 7, 1989, on the return of the Alias Rule to Show Cause issued against Sol Green. Once again, her presence is not reflected in the record. Mrs. Fischer's Affidavit implied that Merrill Lynch's attorney misrepresented the status to the court at that time when stating that Merrill Lynch's counsel had been contacted by Sol Green's counsel, who had asked for time to review the matter. Claire Fischer asserted in her Affidavit that Sol Green had not retained counsel at that time. However, Attorney Jeffrey Randall had contacted Merrill Lynch's counsel on November 3, 1989, stating that he might be filing an Appearance, informing counsel for Merrill Lynch that Sol Green was in the hospital and Gertrude Green was in Florida until November 21, and asking that

the supplementary proceedings be continued for one month (RC. 821). Merrill Lynch's counsel agreed to do this, and the Order of November 7, 1989 accurately reflects this agreement (RC. 823). If Mrs. Fischer was in court that day, and Merrill Lynch's counsel made representations to the court with which she disagreed, why did she not inform the court or Merrill Lynch's counsel at that time?

In addition, Gertrude Green's allegations set forth in her Statement of the Case concerning her Citation examination in March of 1990 were totally contradicted by the Affidavit of Paul H. Scheuerlein (RC. 785-786). Gertrude Green was never shown a document with Sol's signature and asked if it was his signature. Such a question was neither necessary nor appropriate. Gertrude Green did not ask for Visa receipts during the course of the Citation examination nor did she state at that time that Sol Green was not indebted to Merrill Lynch. During the course of the Citation examination, Gertrude Green did not state that Sol Green did or did not live or work in California, but she did state under oath that Sol Green had gone to San Diego to meet with Robert Green, one of the principals of Moving Up Corporation, and had loaned money to Robert Green. Paul Scheuerlein certainly never told Gertrude Green not to worry because Sol was dead.

Finally, Petitioner misconstrues Illinois law while accusing Respondents of improperly pursuing a Citation to Discover Assets before entry of an enforceable judgment. Mrs. Green ignores very clear Illinois law which provides that supplemental proceedings may begin as soon as the foreign state judgment is registered, and registration occurs when the petition, with judgment attached, is filed in Illinois. *Chatham v. Chatham*, 54 Ill.

App. 3d 633, 636, 370 N.E. 2d 50, 53, 12 Ill. Dec. 427, 430 (1st Dist. 1977).

III. Satisfaction of the California Judgment in Illinois

Merrill Lynch did eventually manage to obtain payment of its California Judgment by means of a successful Petition to Set Aside Fraudulent Conveyance filed in the Illinois state court which resulted in the eventual public sale of real estate belonging to Sol Green. In her Statement of the Case, Mrs. Green disingenuously characterizes the transfer of the real estate from Sol Green to her as a "purported" fraudulent conveyance. There is nothing "purported" about it. In his Order of April 13, 1993 (RC. 847-848), Judge Cohen concluded that the conveyance was fraudulent. His conclusion was upheld by the Illinois Appellate Court which found that the record in that case conclusively established that Merrill Lynch had proven fraud-in-law. (App.A to the Petition, p. 4a).

Petitioner correctly states that, while the Illinois enforcement action was proceeding, an action was filed in California on behalf of Sol Green to set aside the California Judgment. Although that proceeding was eventually dismissed for the Estate's failure to appear, Petitioner neglects to mention that the Honorable J. Richard Haden, of the Superior Court of California, County of San Diego, had previously denied the Green's Motion for Preliminary Injunction, finding that their application to the California court contained improper evidence lacking in foundation and containing improper opinion (RC. 221).

Mrs. Green also states that Judge Cohen did not permit her to challenge the validity of the California Judgment. Nevertheless, every judge who has ever reviewed the facts of the history of litigation between Merrill Lynch and the Greens has found that there were numerous attacks on the California Judgment by the Greens. As early as 1994, Judge Marovich of the United States District Court for the Northern District of Illinois stated that "Green and his estate has had ample opportunity to challenge Merrill Lynch's claim. . . . " (App.A to the Petition, p. 4a). In 1998, Judge Hogan also found that the issues were litigated in California on the Motion for Preliminary Injunction and could have been raised before the Honorable Thomas Quinn on the Petition to Register Foreign Judgment in Illinois. (App.B to the Petition, p. 17a). Judge Hogan's conclusions were upheld by the Illinois Appellate Court in its Order of April 20, 2000. (App.A to the Petition, p. 11a).

REASONS FOR DENYING THE WRIT

I. Neither the Record Nor the Decision Below Raises the Question Presented in the Petition.

Petitioner cavalierly announces in a footnote on page 10 of her Petition, without any citation to authority, that, given the lower court's failure to address the invalidity and unconstitutionality of the California Judgment, the lower court's grounds for dismissal are not valid or a bar to the relief Petitioner seeks here. The purported invalidity and unconstitutionality of the California Judgment was, however, never raised in the case below.

The case below involved a complaint against Respondents seeking damages for abuse of process, conspiracy, and aiding and abetting. Not only were constitutional issues never raised, but Petitioner's own counsel in the state court action emphatically proclaimed that they were not trying to vacate what was done in California. A lawsuit which does not address the validity of the California Judgment cannot possibly serve as the foundation for Petitioner's request for a review of the California Judgment by this Court.

II. The Illinois Appellate Court Cited Alternative Grounds in Upholding the Dismissal of Gertrude Green's Complaint

The trial court below dismissed Mrs. Green's Complaint on three different bases. (App.B to the Petition, 17a). The trial court found that the Complaint was barred by *res judicata* and collateral estoppel, that the cause of action for abuse of process was barred by the applicable statute of limitations, and that the causes of action for conspiracy and aiding and abetting could not stand because Cantwell & Cantwell acted as the agent for Merrill Lynch. The Illinois Appellate Court affirmed the trial court, concluding that Mrs. Green was precluded from presenting her claims because of the statute of limitations, and under the doctrines of *res judicata* and collateral estoppel. Because the Illinois Appellate Court determined that the application of the appropriate statute of limitations was dispositive of all of Mrs. Green's claims, the Justices declined to consider the matter of whether a principal and an agent can be liable for civil

conspiracy or aiding and abetting. (App.A to the Petition, pp. 5a-15a). Thus, this is not a good case for granting certiorari because several grounds exist for the Illinois Appellate Court's decision to affirm the trial court.

III. Petitioner Misstates Illinois Law

In her Petition, Mrs. Green accuses Merrill Lynch and its counsel of manipulating the Illinois courts and rules of procedure over a period of four years in order to obtain the Greens' property. Supposedly, Merrill Lynch began this course of conduct by improperly issuing a Citation to Discover Assets against Sol Green simultaneously with the filing of a Petition for Registration of Foreign Judgment against Sol Green. In making this accusation, Petitioner neglected to review Illinois law applicable in 1989.

Section 12-606 of the Uniform Enforcement of Foreign Judgments Act provided:

> **Levy.** At any time after registration and *regardless of whether jurisdiction of the person of the judgment debtor has been secured or final judgment has been obtained,* a levy may be made under the registered judgment upon any property of the judgment debtor which is subject to enforcement or other judicial process for satisfaction of judgments.

Ill.Rev.Stat. (1989), ch. 110, para. 12-606 (emphasis added). "Levy" is defined in Section 12-601(c) as follows:

> . . . to take control of or *create a lien upon property under any judicial process* whereby satisfaction of a judgment may be enforced against such property.

Ill.Rev.Stat. (1989), ch. 110, para. 12-601(c) (emphasis added). As stated by the First District Appellate Court in *Chatham v. Chatham*, 54 Ill. App. 3d 633, 636, 370 N.E.2d 50, 53, 12 Ill. Dec. 427, 430 (1st Dist. 1977):

> . . . it is clear that the Uniform Act is an enforcement statute which authorizes a levy of execution on property as soon as the foreign judgment is registered and before jurisdiction is obtained over the judgment debtor to prevent him from removing the assets before the foreign judgment becomes final in the forum state.

Furthermore, under Illinois law, Ill.Rev.Stat. (1989), ch. 110, para. 2-1402, a citation to discover assets is a method by which a judgment creditor may proceed against a judgment debtor to discover and recover assets in satisfaction of the judgment. A lien is created on all personal property belonging to the debtor upon service of the citation to discover assets. *Pontikis v. Perazic*, 295 Ill. App. 3d 478, 484, 692 N.E.2d 712, 716-17, 229 Ill. Dec. 723, 727-28 (1st Dist. 1998).

By statute, a foreign judgment is registered at the time a petition for registration is filed. Ill.Rev.Stat. (1989), ch. 110, para. 12-603. Thus, Merrill Lynch's initiation of Citation proceedings against Sol Green immediately after filing its Petition to Register Foreign Judgment was entirely proper under Illinois law. *See Marriage of McElwee*, 230 Ill. App. 3d 714, 595 N.E.2d 738, 172 Ill. Dec. 377 (5th Dist. 1992) (judgment creditor entitled to initiate a non-wage garnishment proceeding as soon as a foreign judgment is registered); *Morrow v. Westphal*, 167 Ill. App. 3d 433, 521 N.E.2d 283, 118 Ill. Dec. 215 (3rd Dist. 1988) (non-wage garnishment of judgment debtor's property

could be initiated in proceeding for enforcement of foreign judgment before enforcing court confirmed final judgment).

IV. This Case Does Not Have Constitutional Implications.

In a vain and frivolous attempt to grab this Court's attention, Petitioner asserts that the California Judgment offends the principles of due process espoused in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996). In hopes of creating an issue worthy of writ consideration, Petitioner misrepresents the nature of Merrill Lynch's claims against the defendants in the California lawsuit, as well as the judgment which resulted from those claims. Contrary to Petitioner's argument before this Court, the California Judgment fully comports with California law. Moreover, punitive damages of $50,000.00 on a compensatory damage claim of approximately $25,000.00, jointly and severally against a corporate defendant and three individual defendants, is reasonable, appropriate, and totally inoffensive.

Nevermind the fact that at no time in the history of the almost thirteen years of litigation between Merrill Lynch and the Greens has Sol Green or Gertrude Green ever presented an argument concerning the legality or constitutionality of the punitive damage award. In *Gore*, this Court stated that a punitive damage award enters the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment only when it can be characterized as grossly excessive in relation to the State's legitimate interests in punishment and deterrence. *Id.* at

568. Unlike the 2 to 1 ratio in the matter *sub judice*, the ratio of punitive damages to compensatory damages in *Gore* was a "breathtaking" 500 to 1. *Id.* at 583.

Furthermore, the California Complaint filed by Merrill Lynch against Sol Green and others does disclose the perpetration of deliberate false statements and acts of affirmative misconduct. It was not just a simple breach of contract action, as stated by the Petitioner. On the contrary, the Complaint alleged seven separate counts, six of which were directed at Sol Green, among others, and included causes of action for the independent torts of conversion and fraud. Thus, not only is the punitive damage award reasonable in a constitutional sense, but it also comports with California law.

It is astounding to Respondents that, in light of the record of this case, Mrs. Green can come before this Court and assert that she has not had an opportunity to attack and set aside the California Judgment. Judge Hogan noted, in his Order of January 26, 1998, that the Greens had the opportunity to collaterally attack the California Judgment when Merrill Lynch filed its Petition to Register Foreign Judgment in Illinois, and directly attacked the California Judgment in California on the Motion for Preliminary Injunction. Judge Marovich of the United States District Court for the Northern District of Illinois also found that the Greens had ample opportunity to challenge Merrill Lynch's claim. In fact, all of the issues which Petitioner now presents to this Court have been found by the Illinois Appellate Court to have been raised previously and resolved against Petitioner and in favor of Respondents. Mrs. Green's assertions before this Court are patently false.

V. The Illinois Appellate Court Decision Is Fact-Bound and Will Lack Significant Impact on Other Cases.

When the grandstanding and hyperbole of Mrs. Green's Petition is stripped away, this Court is left with nothing but a typical case of applying undisputed facts to established state law. Mrs. Green had the opportunity to present the facts to the trial court to support her claims. Both the trial court and the Illinois Appellate Court held that the facts she submitted were insufficient. Interestingly, Petitioner does not actually argue that the courts below erred in their respective opinions. Rather, the courts below are accused of failing to address an issue, *sua sponte*, that was never raised by Petitioner in those proceedings. Nevertheless, the decisions below gave full consideration to the facts presented and decided the issues raised correctly. Any legal error which might possibly be found would be unique to this case. Thus, it is not well-suited for review by the Supreme Court.

CONCLUSION

For the foregoing reasons, Gertrude Green's petition for writ of certiorari should be denied.

Respectfully submitted,

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Supreme Court, U.S.
FILED
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No. 00-1667

IN THE

Supreme Court of the United States

GERTRUDE GREEN, as Administratrix of the Estate of Sol Green and Individually,

Petitioner,

v.

MERRILL LYNCH, PIERCE, FENNER & SMITH, a Delaware Corporation, and CANTWELL & CANTWELL,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT, FIRST DISTRICT

PETITIONER'S REPLY BRIEF

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Rule:

Illinois Supreme Court Rule 277 6

Petitioner-Plaintiff Gertrude Green, as Administratrix of the Estate of Sol Green and Individually ("Mrs. Green"), submits her reply to Respondent-Defendant Merrill Lynch Pierce Fenner & Smith's and Cantwell & Cantwell's response in opposition to her Writ.

SUMMARY OF WHY RESPONDENTS' BRIEF SHOULD BE DISREGARDED

None of Respondents' opposition undercuts the sole issue, which remains squarely presented: whether a punitive judgment award which on its face violates *BMW v. Gore*'s due process standard may be attacked collaterally, here, against a punitive damage award at 40 times actual damages, originally obtained by default in a distant state against an elderly, impecunious individual, against which his elderly, poor widow could not afford to defend directly in the distant jurisdiction. In short, this case presents the issue of whether *Gore v. BMW*'s due process prohibition of excessive punitive damages cuts both ways, to protect individuals as well as merchants, and presents the record of due process denials that was lacking in *Green Tree Financial Corp. v. Randolph*, 531 U.S. 79 (December 11, 2000).

Respondents convey an inaccurate description of the record below and misconstrue the state laws that Respondents violated which led to their procurement of two facially invalid default judgments against an Illinois resident, the first secured in a distant California court that had no personal jurisdiction over Petitioner and the second, a foreign registration of the first, obtained without proper service to Petitioner's deceased husband, Sol Green, who was severely ill and who died four months after the purported service, and which were subsequently enforced against Petitioner through a judicial sale of her home.

In addition, Respondents' challenge of this Court's power to hear this appeal ignores the constitutional issues raised below and too broadly restricts this Court's ability to review and invalidate facially unconstitutional default judgments that are blindly given full faith and credit and preclusive effect by resident state courts.

RESPONDENTS' DISTORTED VERSION OF THE RECORD, ATTEMPTING TO CONCEAL THEIR PATENT DUE PROCESS VIOLATIONS, SHOULD NOT DISCOURAGE THIS COURT'S DECLARATION THAT FACIALLY INVALID DEFAULT JUDGMENTS FOR PUNITIVE DAMAGES MAY BE CHALLENGED COLLATERALLY.

I. RESPONDENTS' INACCURATE DESCRIPTION OF THE RECORD

To dissuade this Court from hearing this petition, Respondents attack the factual support of Petitioner's claims. Respondents assert that affidavits of Petitioners that are contained within the record "lacked credibility", are "controverted by Affidavits", are "totally incompetent", and "consisted in large measure of inadmissible hearsay". (Response brief, p. 3). In reading Respondents brief, one would think a trier of fact has already made factual determinations. But the record shows that after entry of the two default judgments, all subsequent courts held themselves bound by those facially invalid judgments and refused to determine the facts. The only opportunity afforded this elderly, poor widow was to traverse across the country to defend herself in California, an opportunity she attempted to do, but could not complete due to physical and financial limitations (R.C. 223, Petitioner's *pro se* California TRO action was dismissed for want of prosecution).

Respondents' contention that material factual determinations have been made by lower courts (Response at p. 15) is disingenuous and belied by the dispositions of those proc:edings. Respondents' contention is especially egregious in light of their vociferous objections to any investigation or determination of the facts before the Honorable Michael Hogan, the presiding judge of Mrs. Green's case against Respondents. For instance, during those proceedings and in response to Judge Hogan's question, "Do I have to have an evidentiary hearing?", counsel for Respondents, Mr. Scheuerlein, stated, "No, you don't, your honor." (R.C. 59).

Most egregious though is Respondents' argument that the California action "was not a simple breach of contract action". (Response at p. 3). An assertion that is belied by the record. Judge Hogan, who reviewed the parties' pleadings and heard extensive oral arguments on two separate occasions, found it to be "troublesome that on a $4,000 credit card claim that we're at this stage" (R.C. 646). Though Judge Hogan dismissed on purely legal grounds and, therefore, never formally entered findings of fact, he was the only judge that was presented with and heard factual disputes.

Equally disturbing is Respondents' assertion that their self-serving affidavits should be given more weight in the record than those supporting Petitioner. Though they do not expressly disclose it in their brief, the only affidavits raised in support of Respondents are those of Paul H. Scheuerlein and Peter A. Cantwell, who are attorneys with the law firm of Cantwell & Cantwell, a named Respondent and legal counsel for Merrill Lynch in this action.

The record shows that Respondents', not Petitioner's, factual support is questionable. Though Respondents attack the affidavit of Alison Boyd based on its lack of a signature, they fail to inform this Court that counsel representing Petitioner at the time filed an affidavit explaining that the Boyd affidavit existed but was misplaced. (R.C. 696). Boyd's signed affidavit, which fully comports with the affidavit in the record, has since been located and will be entered into the record at an appropriate time. Respondents' attack on the Boyd affidavit is obviously an attempt to mitigate the significance the statements contained therein have in showing the invalid nature of the default judgments. Ms. Boyd, a former officer of Moving Up International Corp., and one of the defendants in Merrill Lynch's California action, states in her affidavit that Sol's signature on the Merrill Lynch account was inadvertently placed there and that Sol had resigned from the Company a year prior to the opening of the Merrill Lynch accounts. (R.C. 697-98). Ms. Boyd's affidavit is credible in that the statements made therein exposed her to the risk that Merrill Lynch's inquiry would then be focused upon her.

Moreover, the record reflects Respondents' reckless and careless attitude for Mrs. Green's due process rights. The record shows that Mr. Scheurlein admits to not knowing, or even caring, whether Sol's purported signature on the credit card agreement, their only link of Sol to their default judgments, was truly Sol's. (R.C. 63 and 79).

II. RESPONDENTS' MISAPPLICATION AND DISTORTION OF APPLICABLE STATE LAW

In their brief, Respondents attempt to gloss over their gross manipulation of California and Illinois law by misapplying the law and misstating facts. Respondents' conclusory assertion that the "California Judgment fully comports with California law" (Response at p. 13) rests on their false contention that the California action against Sol was not simply a $4,000 credit card claim. But, as stated by the only judge willing to hear the facts, and as reflected in Merrill Lynch's complaint against Sol, the only plausible claim against him was on the credit card, and only because he purportedly signed the application agreement, not because facts existed to show that he benefitted from use of the card. Consequently, the entry and enforcement against Sol Green alone of the entire default judgment that included, in addition to the credit card claim, $50,000 in punitive damages, a $20,450 purely corporate debt and attorney fees and costs of approximately $10,000 (an approximately 40 to 1 ratio to purported damages), clearly violated both California law, as explained in Mrs. Green's petition, and due process protections raised in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996). Rights which no court thus far has afforded her an opportunity to vindicate.

Though Respondents make a greater effort in arguing that they did not violate Illinois law by issuing a Citation to Discover Assets simultaneously with the filing of a Petition for Registration of Foreign Judgment, their argument here is both factually and legally wrong. (Response at p. 11). In their brief, Respondents justify initiating these proceedings concurrently by citing to Illinois' Uniform Enforcement of Foreign Judgments Act, which at the time expressly allowed for both a Levy and Registration of Foreign Judgment to occur at the same time.

However, the fallacy of Respondents' argument is their misstatement of the undisputed facts. The issue here is not whether Merrill Lynch could have proceeded with a levy, something it never pursued during this relevant time. Rather, the issue is whether Merrill Lynch complied with Illinois law in simultaneously pursuing the registration of its foreign judgment at the same time it pursued the citation to discover assets.

At all relevant times, Illinois law recognized a levy to be separate and distinct from a Citation to Discover Assets. *Cf*, Ill. Rev. Stat (1989), ch. 110, paras. 12-601(c), 12-606, 12-110 and 12-111 (addressing levies); *with* Ill. Rev. Stat (1989), ch. 110, para.12-1402 (addressing citation to discover assets). In contrast to a levy, which only serves to seize control or create a lien on specific, identified property, a citation to discover assets is broader and more intrusive and serves to discover all available assets of the debtor. Moreover, the applicable Illinois Supreme Court Rule addressing the procedures with respect to Supplementary Proceedings, Rule 277, only lists section 12-1402 proceedings (i.e., citation to discover assets) as those that may "be commenced at any time [after] a judgment . . . is subject to enforcement". *See Elmhurst Auto Parts, Inc. v. Fencl-Tufo Chevrolet, Inc.*, 235 Ill. App.3d 88, 600 N.E.2d 1229 (2d Dist. 1992) (recognizing that "a supplemental proceeding under section 12-1402, including a citation to discover assets, . . . differs from an execution and levy"). Consequently, under Illinois law at the time in question, Illinois citation to discover asset proceedings could only begin after a final, enforceable judgment had been entered.

Significantly then, Respondents' improper initiation of the citation proceeding, which the record shows Petitioner participated in *pro se*, and which Respondents later voluntarily dismissed, assured that Petitioner would not take action against Merrill Lynch until it was too late. Respondents' later concealment of their misconduct before Judge Hogan, whereby they proclaimed to the court that their actions at the time were in compliance with Illinois law, (R.C. 31-32) served to dissuade the court from fairly assessing the facially invalid default judgments.

III. JURISDICTIONAL BASES EXIST FOR THIS COURT TO HEAR PETITIONER'S CASE

Respondents' assertion that Mrs. Green failed to raise express constitutional claims below is false as well. She has consistently asserted that Merrill Lynch's action and award against Sol and her home violated due process. Nonetheless, Respondents' argument completely ignores the thrust of Mrs. Green's petition, which asserts that the procurement of the facially invalid default judgment and the registration of that judgment by improper (or even fraudulent) means was unconstitutional, should not have been granted full faith and credit by Illinois courts, and is subject to collateral attack.

Instead of contesting this Court's jurisdictional power under Petitioner's aforementioned reasoning, Respondents instead devote all their attention to attacking Mrs. Green's factual bases and her allegations of Respondents' violations of state laws. In essence, Respondents seek to disingenuously recast the factual record into a version that would possibly leave doubt as to whether Mrs. Green's due process rights were violated. But the record clearly does not favor their position under their jurisdictional theory.

A. Jurisdiction Over This Case Rests in Addressing A Clear Violation of Fundamental Due Process Committed In The Entry And Enforcement of Facially Invalid Default Judgments

The general rule that an appellate court does not give consideration to issues not raised below should not be applied where the obvious result would be a plain miscarriage of justice. *Hormel v. Helvering*, 312 U.S. 552, 557 (1941) (applying income tax laws not applied below); and *Singleton v. Wulff*, 428 U.S. 106, 121 (July 1, 1976) (*citing*, *Turner v. City of Memphis*, 369 U.S. 350, 353 (1962) (refusing to require lower courts to review race discrimination violation where the Court found the violation was clear under the Court's prior decisions). Mrs. Green's case is one in which a clear miscarriage of justice has occurred, the loss of her family home based upon an unsupported allegation of a past due $4,000 credit card claim. The loss of her home is made more egregious by the fact that each of the courts below refused to revisit the facially unconstitutional default judgments, except if she traveled to a far-away jurisdiction at great expense. But as Merrill Lynch acknowledged when they sought to enforce the underlying judgment, the only asset Mrs. Green owned was the family home of approximately 50 years. (R.C. 800). Thus, this Court has the ability to address Respondents' entry and enforcement of a facially void judgment that violated the principle in *BMW v. Gore*, which was thereafter made even more unjust when the only opportunity afforded Petitioner to challenge the void judgment violated the due process principle in *Green Tree Financial*.

B. The Record Reflects That The Lower Courts Either Had Addressed Constitutional Issues or Refused to Hear *Any* Claims, Including Constitutional Ones

The record shows that Judge Hogan considered the possibility that Mrs. Green's fundamental rights of due process were being violated, thus providing the jurisdictional basis under even Respondent's theory. At the January 26, 1988 hearing on Respondents' motion to dismiss, Mr. Scheurelein stated that Petitioner's abuse of process claims were an:

> attempt to make an end run around the full faith and credit provisions of the United States Constitution. (R.C. 606).

Later on, Mr. Scheurelein argued that Petitioner's claims were a collateral attack on Respondents' facially invalid default judgments. (R.C. 644).

In response, Judge Hogan stated:

> What about just the sense of fairness argument that you have got a $4,000 credit card debt, and now, you know, 15 cases later and a sale of a home just seems to me —
>
> * * *
>
> Something has out of wack [sic]. (R.C. 645).

Though Judge Hogan was correct in concluding that a violation of fundamental fairness was being committed against the Green family, he was clearly wrong in dismissing the action as issue and claim precluded.

All other courts that Respondents refer to in their brief simply did not afford Petitioner the opportunity she deserved to attack the facially invalid default judgments. Instead, those courts simply presumed those judgments were valid.

CONCLUSION

For the foregoing reasons, Gertrude Green's petition for writ of certiorari should be granted.

Respectfully submitted,

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